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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

PHIL MAGIDSON,

Petitioner,

vs.

JEROME F. DUGGAN, Trustee of the Estate of Christopher Engineering Company, a Corporation, Debtor, and of National Aircraft Corporation, a Corporation, Subsidiary Debtor, and CHRISTOPHER ENGINEERING COMPANY, a Corporation, Debtor, and NATIONAL AIRCRAFT CORPORATION, a Corporation, Subsidiary Debtor,

Respondents.

No. 747

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1949.

PHIL MAGIDSON, Petitioner, vs. JEROME F. DUGGAN, Trustee of the Estate of Christopher Engineering Company, a Corporation, Debtor, and of National Aircraft Corporation, a Corporation, Subsidiary Debtor, and CHRISTOPHER ENGINEERING COMPANY, a Corporation, Debtor, and NATIONAL AIRCRAFT CORPORATION, a Corporation, Subsidiary Debtor, Respondents.	No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Phil Magidson and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, rendered and entered on the 16th day of February, 1950, in this case lately pending in said Court of Appeals, entitled "Phil Magidson, Appellant, v. Jerome F. Duggan, Trustee of the Estate

of Christopher Engineering Company, a corporation, Debtor, and of National Aircraft Corporation, a corporation, Subsidiary Debtor, and Christopher Engineering Company, a corporation, Debtor, and National Aircraft Corporation, a corporation, Sudsidiary Debtor," No. 14015 of causes on the docket of said Court of Appeals, affirming an order and judgment of the District Court of the United States for the Eastern District of Missouri entered in reorganization proceedings under Chapter X of the Bankruptcy Act. The order appealed from and affirmed (R. 159, 160) made "absolute" a temporary stay of state court proceedings in which the Trustee had intervened. It also overruled a motion of petitioner Phil Magidson (R. 144-158) to vacate and set aside such temporary stay order and the leave granted to Jerome F. Duggan, trustee of the debtor corporation, to file a dependent suit in the Federal District Court against petitioner Phil Magidson and Hascal Schneider and Max Schneider, doing business as Seco-Lite Manufacturing Company.

OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals in said cause, which petitioner seeks to have reviewed, appears on pages 175 to 188 of the printed transcript of the record filed herewith, and said opinion has not yet been officially reported.

SUMMARY STATEMENT OF MATTER INVOLVED.

In 1943 the Christopher Engineering Company, a corporation, filed in the District Court of the United States for the Eastern Judicial District of Missouri its petition for a reorganization under Chapter 10 of the Bankruptcy Act (R. 1-5). That petition was approved by the District Court on December 27, 1943, and Jerome F. Duggan was appointed Trustee of the debtor corporation. Later, in

the same District Court, Duggan was appointed reorganization trustee of National Aircraft Company, an Indiana subsidiary corporation of debtor.

On June 2, 1945, Hascal Schneider and Max Schneider, doing business as Seco-Lite Manufacturing Company, filed a petition in the Circuit Court of the City of St. Louis, Missouri, under the Declaratory Judgment Act of Missouri against petitioner Phil Magidson for a declaration of the rights, duties and obligations of the parties under a contract entered into on or about July 15, 1943, between the plaintiffs and defendant Magidson, in which it was agreed that Magidson was to receive 50% of the profits, after the deduction of certain specified expenses, realized from contracts for the sale of certain airplane parts to be manufactured by the Schneiders under the supervision of Magidson (R. 45-50).

On April 9, 1946, defendant Magidson in the declaratory judgment suit in the state court filed a motion for the appointment of a receiver (R. 51). On April 12, 1946, by agreement of counsel, the court entered an order in that suit that in lieu of the appointment of a receiver the plaintiff should deposit into the registry of the court the sum of $90,000, subject to the further order of the court (R. 51-52). This deposit was accordingly made in the state court in that suit on April 16, 1946 (R. 52).

On November 8, 1946, the district court, in the reorganization proceeding, authorized and directed the Trustee Duggan to intervene in the declaratory judgment suit in the state court (R. 6) and on the same date the Trustee filed his motion in the state court to intervene in that suit (R. 52). That motion was denied by the state circuit court on December 11, 1946; but, on mandamus filed by the Trustee in the Missouri Supreme Court, the circuit court was directed to permit intervention by the Trustee (R. 52). Thereafter, and on March 26, 1948, the Trustee filed his

intervening petition and request for a separate trial in the declaratory judgment suit in the state court (R. 52).

On January 7, 1949, the plaintiffs Hascal Schneider and Max Schneider filed an amended petition in the declaratory judgment suit in the state court, in which they prayed that the Trustee in the reorganization proceeding be added as an additional party defendant and alleging that said Trustee was claiming to be the lawful owner, by constructive or equitable assignment, and subrogated to all of the right, title and interest of the defendant Phil Magidson in the profits, if any, to which Magidson was entitled under his contract with plaintiffs, and that said Trustee had demanded that plaintiffs account to him for said profits and pay over to him the amount found to be due on such accounting (R. 53-58).

On January 12, 1949 (R. 135), the Trustee filed an answer, cross-bill and cross-claim to the amended petition in the declaratory judgment suit in the state court (R. 59-72) in which said Trustee alleged that he was lawfully and equitably subrogated to the rights of the defendant Phil Magidson to an accounting from the plaintiffs for the profits to which he, the defendant, Magidson, became entitled under his contract of joint adventure with the plaintiffs and which profits were represented and secured in part by the deposit by the plaintiffs into the registry of the state court of the sum of $90,000, against which the defendant Magidson was asserting rights, adversely to, and in fraud of, the Trustee's claim to said fund. The Trustee in said answer further alleged that the defendant Magidson while in the employ of the debtor company, and in violation of his contract of employment with that company, and for the purpose of his individual gain and profit, entered into secret negotiations and secretly contracted with the plaintiffs to engage in a joint project with them for the manufacture and sale of airplane parts in competition with the debtor company, its associates and subsidiaries, for which the defendant Magidson was to

receive one-half of the net profits derived from the sale of said products, and that the defendant Magidson's share of said profits amounted to more than $100,000. The prayer of the Trustee in his answer to said amended petition was: (1) that the Court first hear and, upon such hearing, decree that the Trustee was the owner by equitable subrogation, to the exclusion of the defendant, Magidson, of all that portion of the undistributed profits earned by the defendant Magidson under his contract of joint adventure with the plaintiffs for the sale and manufacture of airplane parts, and that the defendant Magidson be enjoined from asserting or prosecuting any claim against plaintiffs for the recovery of said profits; (2) that the defendant Magidson be required to account and pay over to the Trustee the amounts theretofore received by him from the plaintiffs on account of the net profits ostensibly accruing to him under his contract of joint adventure with the plaintiffs, and (3) that plaintiffs be required to account to the Trustee for the unpaid portion of the profits to which the said Magidson became entitled under his contract with plaintiffs.

Attached as an exhibit to the Trustee's answer, as aforesaid, was a copy of a contract between the debtor Christopher Engineering Company and Phil Magidson, dated July 1, 1942, under which Magidson agreed among other things that he would continue in the service of said company for a period of two years, unless he should terminate said contract at an earlier date upon two weeks' written notice to said company and that he would not, within a period of two years subsequent to the termination of said contract, accept employment with any customer or competitor of the Christopher Engineering Company.

Defendant Magidson also filed an answer and counterclaim to the amended petition of the plaintiffs in the declaratory judgment suit in the state court (R. 72-86), in which he prayed that plaintiffs be required to account

and pay over to him one-half of the net profits realized by them from the manufacture and sale of airplane parts, in conformity with his contract with the plaintiffs. In that counterclaim Magidson also sought damages against the Schneiders for maliciously withholding his share of the profits and putting him in jeopardy with the United States Internal Revenue Bureau.

A pre-trial conference was had in the state declaratory judgment suit on February 2, 1949, and, as a result of that conference, the Circuit Court found that two separate and distinct disputes or controversies were involved in that suit, one between the plaintiffs and the defendant Magidson as to the amount of net profits, if any, for which the plaintiffs were obligated to the defendant Magidson under the contract of July 15, 1943 as aforesaid, and the other between the defendant Trustee and the defendant Magidson as to whether or not the latter had violated and breached his contract of July 1, 1942 with the Christopher Engineering Company so as to entitle said Trustee to the profits payable to Magidson under his contract of July 15, 1943 with plaintiffs. The Court further ruled that the principal controversies were between the plaintiffs and the defendant Magidson, both upon the accounting and upon Magidson's counterclaim for damages, and ordered and directed that a trial should first be had of those two controversies before any hearing was had on the remaining controversy between the defendant Trustee and the defendant Magidson (R. 121-124). However, the state court judge in his order specifically noted that the trustee had a right to participate in the Magidson-Schneider trial so as to safeguard whatever interest, if any, the Trustee had.

On February 2, 1949, the state court ordered that the principal controversies in the declaratory judgment suit be set for trial on April 11, 1949 (R. 125).

On March 17, 1949, the Trustee, by leave of the District Court in the reorganization proceeding (R. 90), filed in the federal district court his "complaint for an accounting, to collect assets and for equitable relief" against Hascal Schneider, Max Schneider and Phil Magidson, in which he made substantially the same allegations as that contained in his answer and cross-bill to the amended petition in the declaratory judgment suit in the state court as aforesaid. In addition he alleged that because the state court had set down for trial in the declaratory judgment suit the controversy between the plaintiffs and the defendant Magidson in advance of the controversy between the Trustee and Magidson, the Trustee could not secure in the State Court a prompt and final decision on the merits of his claim as subrogee of Magidson, and, as a result, the reorganization proceedings in the federal court were being hindered and delayed, and the Trustee prayed the reorganization Court to stay the declaratory judgment suit in the state court pending the final judgment of the reorganization court and to either enter an order enjoining the distribution of the $90,000 deposited in the state court, or that the reorganization court itself take possession of said deposit (R. 12-20). The complaint was verified (R. 20).

On the same date, to-wit, March 17, 1949, the District Court in the reorganization proceeding entered an order staying the declaratory judgment suit in the state court until the further order of the reorganization court and enjoining and restraining the parties thereto from proceeding with the prosecution of that suit and ordering the defendants Hascal Schneider, Max Schneider and Phil Magidson to show cause on March 22, 1949, why the order staying the declaratory judgment suit in the state court should not be made permanent (R. 10-11).

Defendant Magidson filed his return in the district court to the aforesaid order of that court to show cause, coupled

with a motion (1) to set aside and vacate the leave granted to the Trustee to file the dependent proceeding against the defendants, Hascal Schneider, Max Schneider and Phil Magidson, and (2) to vacate and set aside the order of the reorganization court staying the declaratory judgment suit in the state court and enjoining and restraining the parties thereto from proceeding with the prosecution of that suit (R. 144-158). On the hearing of that motion, the same was overruled and the order staying the declaratory judgment suit in the state court was made "absolute" by the district court (R. 159-160).

No findings of fact or conclusions of law were made by the district court either in staying the prior action in the state court or in enjoining the parties thereto from the further prosecution of that action (R. 10-11), or in making the stay order absolute (R. 159-160) and in overruling petitioner's motion to set aside those orders (R. 159).

Thereafter Magidson in due course appealed "from each and every portion of said Order and Judgment" to the United States Court of Appeals for the Eighth Circuit (R. 161), where said appeal was duly perfected, argued and submitted. On February 16, 1950, the Court of Appeals filed an opinion in said cause (R. 175-187) affirming the order appealed from.

The Court of Appeals did not pass directly upon the appellant's contention that the federal court had no jurisdiction under rules of comity to entertain a suit where one in rem and involving identical issues was already pending in a state court which not only had possession of the res, $90,000, but also had jurisdiction over all of the parties, including the Trustee. If such issue was ruled, it was only by implication. The necessary effect of the decision is that instead of exclusive jurisdiction resting in the State court, an exclusive and non-delegable jurisdiction lay in the federal court.

However, the appellant also contended that whatever jurisdiction the federal court might have had of a plenary suit between the Trustee and Magidson for breach of the contract between the debtor and Magidson, it had no jurisdiction of the separate controversy between Magidson and the Schneiders upon an entirely different contract to which the debtor was not a party.

The Court of Appeals held that under Williams v. Austrian, 331 U. S. 642, a federal reorganization court has jurisdiction to entertain plenary suits for the collection of estates of bankrupts; that Section 2 (a) (7) of the Bankruptcy Act, 11 U. S. C. A. 11 (a) (7), confers such jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto"; that the dispute between Magidson and the Schneiders "is clearly a controversy in relation to the reorganization proceedings, since the Trustee's asserted claim to equitable ownership of the fund involved in the suit in the state court, if proven, would very substantially increase the debtor's estate and thereby directly affect the reorganization"; that for these reasons the federal court had "complete jurisdiction" of the dependent suit; and that the action involving the same dispute in the state court was properly stayed. The necessary effect of this holding was that the reorganization court had not only exclusive jurisdiction over the debtor's claim against Magidson, but also exclusive jurisdiction to determine Magidson's rights against the Schneiders under their contract of July 15, 1943.

In answer to appellant's contention that the federal court had no power, in violation of 28 U. S. C. A. 2283, to enjoin the state court action, the Court of Appeals did not refer to that statute. It did point to Section 2 (a) (15) [11 U. S. C. A. 11 (a) (15)] of the Bankruptcy Act giving a bankruptcy court power to "make such orders * * *

as may be necessary for the enforcement of the provisions of this title." It also referred to 11 U. S. C. A. 515 in Chapter X of the Act which gives a reorganization court powers "which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor." And, after reviewing the petition filed by the Trustee, the Court said that the allegations thereof, if true, "showed on their face that continuation of the proceedings in the state court might well hinder the trustee in expeditious collection of assets of the debtor," and that "the state court proceedings had already involved long delay and longer delays were threatened."

Appellant also contended that the district court had in effect issued a temporary injunction when it made the stay order "absolute," and that it violated Rules 52 (a) and 62 (d) of the Federal Rules of Civil Procedure in failing to file findings of fact and conclusions of law. The Court of Appeals held that the order appealed from was one overruling a motion to set aside a stay order so that Rule 52 (a) did not apply. Moreover, said the Court, "the considerations on which the court ruled are sufficiently clear from the record and pleadings, and although the situation was presented where the court might have made findings of fact, there was no real necessity for doing so," citing Baltimore & Ohio R. Co. v. Chicago R. & I. R. Co., 7 Cir., 170 F. 2d 654, 659.

Magidson's petition for rehearing, timely filed, was overruled on March 8, 1950 (R. 211).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254. Certiorari should be granted because the Court of Appeals has decided, **first**, a question of comity, either in conflict with applicable and controlling

decisions of this Court (such as Penn Casualty Co. v. Pennsylvania, 295 U. S. 189, 195), and the decision of another Court of Appeals (Warder v. Brady, 4 Cir., 115 F. 2d 89), or reserved by this Court in Williams v. Austrian, 331 U. S. 642, 662, and of such importance to the administration of the Bankruptcy Act that it should now be settled; **second**, a question involving the power of Federal Courts to enjoin State Court actions, in contravention of 28 U. S. C. A., Section 2283, and in conflict with such cases as Callaway v. Benton, 336 U. S. 132, 150; Mandeville, Trustee, v. Canterbury, 318 U. S. 47, 49, and Toucey v. New York Life Ins. Co., 314 U. S. 118, 132; and, **third**, a question involving the necessity of filing findings of fact, conclusions of law and a statement of reasons upon issuance of an injunction, in violation of Federal Rules 52 (a) and 65 (d), in conflict with such controlling decisions as United States v. Causby, 328 U. S. 256, 267-268, and Public Service Commission v. Wisconsin Tel. Co., 289 U. S. 67, 70, and in conflict with an opinion of the Seventh Circuit in Shannon v. Retail Clerks International Protective Ass'n, 128 F. 2d 553, 555.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. In Chapter X proceedings under the Bankruptcy Act, may the rules of comity be ignored by the reorganization court without specific statutory warrant so as to pre-empt exclusive jurisdiction over an action in rem previously instituted and still pending in a state court?

2. Even if a reorganization court has jurisdiction, may it enjoin a prior state action in violation of 28 U. S. C. A., Section 2283, (a) where its jurisdiction is not exclusive, and (b) where an injunction is not "necessary in aid of its jurisdiction"?

3. May a federal court issue a temporary restraining order upon affidavit, and then make that order "absolute" without making or filing any findings of fact, conclusions of law or statement of reasons, as required by Sections 52 (a) and 65 (d) of the Federal Rules of Civil Procedure?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons why the Court should issue a writ of certiorari herein are:

1. In Williams v. Austrian, 331 U. S. 642, 662, this Court held that "Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts", so as to permit the filing of plenary suits even in the absence of diversity of citizenship. Upon an insistence that "the state courts will automatically be deprived of jurisdiction to hear a trustee's plenary suits", Your Honors said that "whether or not this or other suggested consequences will follow we leave for consideration in cases presenting such issues for decision."

Such a case is now before this Court. Its determination is not only necessary to resolve a conflict between State and Federal authority, but also one of importance in the administration of the Bankruptcy Act. See Callaway v. Benton, 336 U. S. 132, 136.

Upon the basis of a passing, general statement in Warder v. Brady, 4 Cir., 115 F. 2d 89, 93, that rules of comity are "relaxed" in reorganization proceedings, the Court of Appeals in effect held that such rules had been completely repealed. It held that the federal court not only could assume jurisdiction over a trustee's plenary suit against Magidson (petitioner herein) and the Schneiders, despite the pendency of a prior state court action in rem to which

the trustee was a voluntary party by intervention, but also the federal court could enjoin the state court action. This breach of comity, without any express statutory warrant for exclusive jurisdiction, was aggravated by the fact that the State action enjoined included a counterclaim in tort by Magidson against the Schneiders, in which counterclaim the trustee neither had nor asserted any right, title or interest either at law or in equity.

We earnestly submit that Congress has not issued any statutory warrant for the exercise of such an assertion of exclusive, non-delegable jurisdiction. Williams v. Austrian, supra, did not hold that exclusive jurisdiction of all plenary actions by a trustee lay in the federal court. Comity was not there involved. It is of the utmost importance that this Court now rule the issue reserved in the Williams case, and authoritatively decide whether any and all suits directly or remotely affecting the estate of a debtor in reorganization fall within the exclusive jurisdiction of a federal court.

It is equally important that Your Honors halt the threatened tide of conflict between state and federal courts with respect to suits in rem which will surely follow the decision of the Court of Appeals. The opinion filed by that Court is in direct conflict with controlling and applicable decisions of this Court upholding rules of comity, and clearly stating in res cases that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." Penn Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, and cases cited; Covell v. Heyman, 111 U. S. 176, 182; Palmer v. Texas, 212 U. S. 118, 129; Kline v. Burke Construction Co., 260 U. S. 226, 229; United States v. Bank of New York & T. Co., 296 U. S. 463, 477.

2. The decision of the reorganization court as affirmed by the Court of Appeals permits a reorganization court,

despite the provisions of 28 U. S. C. A., Section 2283, to stay state court proceedings, although such an injunction is not expressly authorized by Act of Congress, nor in aid of the reorganization court's jurisdiction.

Such a holding is in direct conflict with and contrary to the rulings of this Court in Toucey v. New York Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100, and in Callaway v. Benton, 336 U. S. 132, 142. Although raised and fully preserved by petitioner in his appeal from the reorganization court's action, the opinion of the Court of Appeals nowhere touches on the restrictive impact of Section 2283 on the federal reorganization court's powers to enjoin. If the stay orders issued had halted only the controversy brought by the trustee against Magidson in the state court, the importance of the question involved, concerning as it does an open conflict of state and federal authorities, would be sufficient to warrant a full review by this Court. But when to this is added the absolute stopping of two controversies between parties in no way connected with the reorganization proceedings, the far-flung implications of such a decision cannot be overemphasized. There were three separable controversies involved in the state court action: (1) that between the petitioner, Magidson, here and the reorganization trustee; (2) the action brought by the Schneiders against Magidson; and, finally, (3) the counterclaim of petitioner against the Schneiders for damages because of their wrongful actions. All three actions were summarily stopped by the reorganization court's two stay orders, and these injunctions were upheld by the Court of Appeals without even a passing comment on the prohibition of Section 2283 or controlling decisions thereunder.

3. Sections 52 (a) and 65 (d) of the Federal Rules of Civil Procedure compel a reorganization court in issuing injunctions to make findings of fact and conclusions of

law on every "material issue" and to include in injunctions, be they restraining, temporary or final in nature, the reasons for their issuance.

The reorganization court issued a temporary and later an absolute stay order. Neither order contained any reasons for their issuance, and neither findings nor conclusions were made in either instance.

This plain error and avoidance of mandatory requirements of the Federal Rules was endorsed by the Court of Appeals on the supposed authority of Baltimore & Ohio R. Co. v. Chicago River & Indiana R. Co., 7 Cir., 170 F. 2d 654, 659. No attempt was made to distinguish the facts from the controlling decisions of this Court in United States v. Causby, 328 U. S. 256, and Public Service Commission v. Wisconsin Telephone Co., 289 U. S. 67, 70.

In Baltimore & Ohio R. Co. v. Chicago River & Indiana R. Co., supra, l. c. 659, that Court held that where a motion to dissolve an injunction was denied findings and conclusions are not required if "at the time the Court issued the injunction, it entered in compliance with Rule 52 (a), findings of fact and conclusions of law." It distinguished Bank of Madison v. Gauber, 7 Cir., 158 F. 2d 137, and Dearborn National Casualty v. Consumers Petroleum Co., 7 Cir., 164 F. 2d 332, in that respect, and under proper construction of the Federal Rules, made clear the difference between a motion to dissolve and the issuance of an injunction. Rule 52 (a) applies to the latter, but, of course, is not applicable in the former instance.

Although the Court of Appeals in its opinion concedes that the order appealed from made absolute a temporary stay order (R. 178), and that both a temporary and permanent injunction were issued by the trial court (R. 185), yet it treats the order from which the appeal was taken as the mere denial of a motion to dissolve an injunction when discussing the reasons for ignoring the mandatory

requirements of the Federal Rules. The decision is in open and irreconcilable conflict not only with the decisions of this Court in United States v. Causby, 328 U. S. 256, and Public Service Commission v. Wisconsin Tel. Co., but also the decisions of the Seventh Circuit in Bank of Madison v. Gauber, supra; Dearborn National Casualty v. Consumers Petroleum Co., supra; Shannon v. Retail Clerks International Protective Ass'n, 7 Cir., 128 F. 2d 553, as well as Baltimore R. Co. v. Chicago River & Indiana R. Co., supra, upon which the Court of Appeals relied.

PRAYER FOR THE WRIT.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Court of Appeals for the Eighth Circuit, to the end that the opinion and judgment of said Court of Appeals in the cause of Phil Magidson, Appellant, v. Jerome F. Duggan, Trustee of the Estate of Christopher Engineering Company, a corporation, Debtor, et al., Appellees, No. 14015 in said Court of Appeals, be reviewed by this Court, as provided by law, and that the judgment of the United States Court of Appeals for the Eighth Circuit in said cause be reversed, and that petitioner have such other relief as to this Court may seem meet and proper.

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MAX SIGOLOFF,
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Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

A statement of facts and an outline of the jurisdiction of this Court, required by Rule 27, has been set out in the foregoing petition and is not repeated here in the interest of brevity.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the reorganization court had any jurisdiction of the trustee's plenary action, it appearing that there was a prior suit in rem pending in a state court in which all parties, including the trustee, were present.

2. In holding that the reorganization court could enjoin prosecution of the state court action without any showing that such injunction was "necessary in aid of its jurisdiction."

3. In holding that a temporary (or permanent) injunction might issue without findings of fact, conclusions of law or a statement of reasons.

SUMMARY OF THE ARGUMENT.

I.

Under rules of comity in res actions "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other." A state court action involving identical issues was pending and actually set for trial. It had physical possession of the res and all interested persons including the trustee were present and had pleaded. The federal court's assumption of jurisdiction was an open violation of rules of comity.

Penn. Casualty Co. v. Pennsylvania, 294 U. S. 189, 195;
Peck v. Jenness, 7 How. 612;
Covell v. Heyman, 111 U. S. 176, 182;
Farmers Loan & Trust Co. v. Lake Street Electric Ry. Co., 177 U. S. 51;
Palmer v. Texas, 212 U. S. 118, 129;
Kline v. Burke Construction Co., 260 U. S. 226, 229;
United States v. Bank of New York & T. Co., 296 U. S. 463, 477.

Congress has not attempted by any chapter or section of the Bankruptcy Act to reverse these rules of comity in a case, such as this, where the res involved does not belong to the debtor, is not in the actual or constructive possession of the debtor or its trustee, and the state court proceeding does not seek to enforce a lien against it.

Warder v. Brady, 4 Cir., 115 F. 2d 89, 93;
Compare In re Maier Brewing Co., 38 F. Supp. 806, where comity had been expressly "relaxed" by Section 113 of Chapter X giving the Federal Court power to "grant a temporary stay * * * of any act or proceeding to enforce a lien against a debtor's property."

II.

If the state proceeding was in personam, or if rules of comity do not apply to reorganization courts, the federal court's jurisdiction was not exclusive. The state court certainly had concurrent jurisdiction at the least.

28 U. S. C. A., Section 2283, prohibits Federal Courts from enjoining state actions except where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction." Neither Section 2 (a) (15) [11 U. S. C. A., 11 (a) (15)] nor any other section of the Bankruptcy Act gives bankruptcy or reorganization courts power to stay state court actions in rem in which the trustee is a voluntary, intervening party. There is nothing in the Act to permit federal courts to enjoin collateral proceedings between third persons where property of the debtor is not involved and no lien is being asserted against its property. No section of the Act permitted the federal court to enjoin a counterclaim controversy in tort between Magidson and the Schneiders in which the trustee neither had nor asserted any interest.

Nor was an injunction "necessary in aid of" the reorganization court's jurisdiction. That jurisdiction was unimpaired by the state court plenary suit. A reorganization court has no power to enjoin state court proceedings upon the supposed ground that the state action has been or will be delayed, because if the reorganization court had any juirsdiction at all in this matter (which we deny) it could proceed concurrently to an expeditious judgment.

However, there was no "delay" in the state court. The case was set for trial on April 11, 1949. The only delay which occurred was that occasioned by this very action of the trustee in filing the federal court action on March

17, 1949, and obtaining a stay and delay of the state court suit.

28 U. S. C. A., Section 2283;
Toucey v. New York Life Ins. Co., 314 U. S. 118;
Callaway v. Benton, 336 U. S. 132, 150;
Mandeville, Trustee, v. Canterbury, 318 U. S. 47, 49.

III.

The reorganization court issued a temporary restraining order in plain violation of Rule 65 (d) of the Federal Rules of Civil Procedure, which requires that "every order granting an injunction and every restraining order shall set forth the reasons for its issuance."

Shannon v. Retail Clerks International Protective Assn., 7 Cir., 128 F. 2d 553, 555.

After hearing on the order to show cause the stay order was made "absolute," in effect granting a temporary injunction. No findings of fact, conclusions of law or statement of reasons was filed then or at any time. That was a violation of both Rule 52 (a) and Rule 65 (d) of the Federal Rules. However, the Court of Appeals held that findings, conclusions and a statement of reasons were not necessary because findings are not necessary on decisions of motions, and "the considerations on which the Court ruled are sufficiently clear from the record and pleadings, and although the situation was presented where the Court might have made findings of fact, there was no real necessity for doing so."

In the first place the order appealed from contained not only an order denying a motion to set aside the temporary stay order, but it also included an order making the stay "absolute." The latter order was a temporary injunction. In the second place, the reasons (law or fact or both?) for

the District Judge's ruling are not clear by any standard, and it was highly necessary that he speak. In the third place, "findings of fact on every material issue are a statutory requirement."

U. S. v. Causby, 328 U. S. 256, 257, 258.

"These are strangely worded, mandatory provisions which should be respected. They are not meaningless words."

Shannon et al. v. Retail Clerks International Protective Assn., supra.

"The reasons exist and they are not the less imperative when the injunction is interlocutory."

Public Service Commission v. Wisconsin Tel. Co., 289 U. S. 67, 70.

ARGUMENT.

I.

Under rules of comity applicable to suits in rem, the District Court had no jurisdiction to entertain the trustee's action or to enjoin the state court suit previously instituted. Congress has not provided any exception to or "relaxation" of rules of comity where, as here, the debtor is not in possession of the res and the state court proceeding does not seek to enforce a lien against it.

The state court has actual, physical possession of $90,000.00 about which these controversies revolve. The debtor does not have possession. Neither does his trustee nor the federal court. And the state suit was filed first. Moreover, the state suit is not proceeding ex parte the trustee because he was permitted to intervene upon his own motion and then submitted to state jurisdiction. It was after he forced his way into the suit by mandamus and on the very eve of the trial which he had sought, that he filed a dependent action in the federal court and obtained an order restraining the state court from going ahead with the case.

The facts are just that simple, and the issue is clear-cut: which court has jurisdiction—the state court which has the fund and in which suit was first filed, or the federal court which does not have the fund and in which suit was later filed?

Under rules of comity first announced many, many years ago and followed unswervingly to date, "the possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts

of co-ordinate jurisdiction from exercising like power." Farmers' Loan & Trust Co. v. Lake Street Electric Ry. Co., 177 U. S. 51, citing a number of cases running back to Peck v. Jenness, 7 How. 612, decided in 1849, over 100 years ago. This is the rule, baldly stated above, which has never been broken through the years, Covell v. Heyman, 111 U. S. 176, 182; Palmer v. Texas, 212 U. S. 118, 129; Kline v. Burke Construction Co., 260 U. S. 226, 229; United States v. Bank of New York & T. Co., 296 U. S. 463, 477. "To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, and to protect the judicial processes of the court first assuming jurisdiction, the principle, applicable to both federal and state courts, is established that **the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other.**" Penn Casualty Co. v. Pennsylvania, 294 U. S. 189, 195, and cases cited.

Therefore, the state court, having physical possession of the res, had exclusive jurisdiction to proceed **unless** some exception exists by virtue of the fact that the dependent suit was filed in a Chapter X reorganization proceeding.

Does such an exception exist? The answer must be an unequivocal negative because Congress did not expressly or by inference intend to create an exception in any case other than those plainly written into the Act. In other words, there is no section of the Bankruptcy Act, including Chapter X, relating to reorganizations, which **reverses** the rule of comity so as to divest state courts of an acquired, exclusive jurisdiction and transfer that jurisdiction to a federal court. We emphasize again, of course, that the fund is in the state court; that it is not in the possession of the debtor, trustee or federal court; that adverse claims to the fund are being asserted in the state court; that all adverse parties are present in the state court; that its jurisdiction was first acquired; that the federal court ac-

tion is not necessary to preserve an asset of the debtor (its chose in action against Magidson), and that the state court action is not a foreclosure proceeding which threatens to destroy any equity of the debtor.

We fully concede that Congress has full power to confer exclusive jurisdiction upon federal courts, despite rules of comity. The only question is: Has it done so in a case like that at bar under the facts just stated in the preceding paragraph?

The Court of Appeals in the case at bar held that the laws of comity had not been violated because "Courts in reorganization proceedings under Chapter X have by virtue of the Act of 1938, as interpreted in the Austrian case, a much wider control over the collection of estates of debtors in reorganization than had bankruptcy courts." The Court quoted this one sentence from Warder v. Brady, 4 Cir., 115 F. 2d 89, 93: "The rule of comity is relaxed with respect to proceedings under Chapter X." It also cited In re Maier Brewing Co., 38 F. Supp. 806.

Although rules of comity are "relaxed" in Chapter X proceedings, they have not been destroyed. They are "relaxed" only so far as the statute has provided that they should be. Reorganization courts should not be permitted to extend their jurisdiction solely because of a vague generality or comment that rules of comity are "relaxed."

In Williams v. Austrian, 331 U. S. 642, the Supreme Court merely held "**that Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts,**" so as to permit the filing of plenary suits even in the absence of diversity of citizenship. No question of conflict between federal and state courts was involved. Comity was not discussed. Particularly to be noted, moreover, is the concluding paragraph of the majority opinion at 331 U. S., l. c. 662:

"Petitioners insist that certain consequences, which they term undesirable, will flow from this decision. It is said, for example, that the state courts will automatically be deprived of jurisdiction to hear a trustee's plenary suits. But whether or not this and other suggested consequences will follow we leave for consideration in cases presenting such issues for decision."

In the Warder case, the court on appeal **reversed** a turnover order for the very reason that title to the fund passed from the debtor before bankruptcy and was not "property of a debtor in the possession of a receiver * * * which under the terms of the Act should be delivered to the trustee in bankruptcy." Warder v. Brady, 115 F. 2d 89, 96.

The Warder case is authority in **our** favor because it highlights the fact that the rule of comity is relaxed only by **Congress** and then only by strict interpretation of the **express** language of the Act. The Warder case is authority against federal jurisdiction where title to the fund no longer rests in the debtor or his receiver in the state court. The Warder case refused to interfere with the state court in recognition of the rule of comity, not in derogation of it, and it did so because no express statutory warrant for interference existed. The Warder case is certainly no authority for disregarding the rule of comity where, as here, the state court (not a receiver) has the fund, the lien asserted is by the trustee and not against the debtor's property, and the debtor's claim is openly contested.

The recurring question is this: what section of the Bankruptcy Act creates an exception to the rule of comity in the case at bar where the facts are those stated above?

The case of In re Maier Brewing Co., 38 F. Supp. 806, did not even touch upon the question of comity but merely cited at length the Warder case in which that court, speak-

ing with reference to the **express** provisions of the Act, had said that the "rule of comity is relaxed with respect to proceedings under Chapter X." This case involved the question of whether a lienholder had a right to continue a proceeding to foreclose a chattel mortgage in the state court, which was commenced prior to the filing of the debtor's petition under Chapter X. The court held that the pendency of the foreclosure suit did not bar the federal court from determining whether grounds for foreclosure still existed. The court assumed jurisdiction to make that determination—not because of some generality in the Warder case that comity was "relaxed"—but because Section 113 of Chapter X gave the federal court jurisdiction to "grant a temporary stay * * * of any act or other proceeding to enforce a lien against a debtor's property." Section 113 of Chapter X gave the court **express** jurisdiction to "enjoin or stay * * * any act or proceeding to enforce a lien upon the property of the debtor." Judge Hollzer in his opinion quoted these sections as the statutory basis for his inquiry. His ruling did not rest upon a "relaxation" of comity.

Warder v. Brady, supra, in the Fourth Circuit, is in conflict with the Magidson case in the Eighth Circuit. In addition, we have here a very serious and important issue in the administration of the bankruptcy laws since the Magidson case will permit a trustee to remove any case in which he has the remotest interest to the federal courts. A conflict in state and federal authority is inevitable, and the result will not only be unseemly, but disastrous. Congress never intended such a result, and the Supreme Court's rules of comity, long recognized, are applicable. The opinion filed by the Court of Appeals is in conflict with them. A writ of certiorari should be granted to answer the question expressly left open in Williams v. Austrian, supra.

II.

Even if the federal court had jurisdiction, contrary to the rule of comity, the state court had a concurrent jurisdiction. The federal court had no power to enjoin the state court proceedings previously instituted, since (a) the federal court's jurisdiction was not exclusive, and (b) no cause for injunctive intervention was pleaded or shown.

Even if the proceeding in the state court had been or was in personam, or even if the rules of "comity" have been completely wiped out in reorganization cases (which we strongly deny), that would not **exclude** the state court from proceeding with the case. Its jurisdiction in either of those events would at least be concurrent. In such an instance, the federal and state suits might both proceed since federal jurisdiction by no construction of the Act or the Williams case could be said to have been exclusive. That leaves only one ground for the injunction: necessity in aid of jurisdiction.

There can be no question of the power of a federal court of equity to enjoin state court proceedings if an injunction is "necessary for the enforcement of the provisions of this title (Bankruptcy Act)." Section 2 (a) (15) [11 U. S. C. A. 11 (a) (15)] of the Act. So also, Section 2283 of the Judicial Code (28 U. S. C. A. 2283) does not prevent injunctions against state court actions where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The question then presented is whether an injunction was **"necessary"** for the enforcement of the Bankruptcy Act under either the pleadings or evidence in the case at bar. Was it "expressly authorized by Act of Congress," or "necessary in aid of its jurisdiction"? We examine

this question, as ruled by the opinion filed, in the light of Toucey v. N. Y. Life Ins. Co., 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100, in which that court, in speaking of what is now Section 2283, traced its history back to 1793 and said at 314 U. S., l. c. 132:

> "The provision expresses on its face the duty of 'hands off' by the federal court in the use of the injunction to stay litigation in a state court. The language of the Act of 1793 was unqualified. '* * * nor shall a writ of injunction be granted to stay proceedings in any court of a state * * *' 1 Stat. 335. In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition."

In the case at bar the Court of Appeals said:

> "The allegations of the trustee, if shown to be true in a hearing on the merits, which of course are not before this court, showed on their face that continuation of the proceedings in the state court might well hinder the trustee in expeditious collection of assets of the debtor. The state court proceedings had already involved long delay and longer delays were threatened.
>
> "* * * The temporary and permanent injunctions issued by the trial court in the instant case were to aid and preserve the court's jurisdiction over the subject matter involved * * *."

We most respectfully submit that the Court of Appeals inadvertently overlooked the fact that **the trustee and not Mr. Magidson has hindered and delayed the reorganization proceedings by filing the dependent bill and seeking to stay the state court action.**

Magidson's cause of action against the Schneiders arose in 1945. The Schneiders sued Magidson in 1945. The

latter answered, counterclaimed and forced the Schneiders to deposit $90,000 in the state court in 1946. Magidson has been seeking to try that action ever since.

The trustee has never presented a plan of reorganization. He never moved on his alleged claim until November, 1946. He never brought suit against Mr. Magidson, though he had been in office since 1943. Finally, and in November, 1946, he moved to intervene. The state court promptly and in December, 1946, denied such leave. (Surely, there was no "delaying" action of anyone except the trustee to this point.) A final Writ of Mandamus was not granted by the Supreme Court of Missouri until March, 1948. There is and can be no claim that the state circuit judge did not act in good faith in denying intervention. (We are now up to March, 1948, and the state court action has been stopped "cold" since November, 1946, by the trustee.)

In July, 1948, the trustee sought leave to file this dependent suit. That leave was **denied**, not by the Judge in the state court, but by the **federal** court. In the first two months of 1949, Judge Aronson in equity in the state court was holding pre-trial conferences and awaiting a brief from the trustee's attorney. Magidson wanted his claim against the Schneiders to be heard first, and Judge Aronson agreed that that was logical. It was at that point, in March, 1949, after one day's notice by letter mailed to Magidson's attorney, the trustee filed this dependent suit, obtained a temporary restraining order and a rule to show cause.

If the trustee has any cause of action against Magidson, it arose in 1943. The present suit was filed in 1949. If the federal court had jurisdiction in 1949, then it also had jurisdiction in 1943. It was Mr. Magidson, not the trustee, who moved in on the Schneiders in 1945. Mr. Magidson has done nothing to hinder the trustee. Shall a man be

enjoined from entering the doors of his own state's courthouse merely because he appeared there and honorably sought his "day in court"!

Even if "delay" resulted, it must be shown that the injunction was **necessary** for the enforcement of the Bankruptcy Act. 11 U. S. C. A. 11 (a) (15). The record shows that the state court trial was set for April 11, 1949. Was it, indeed, **necessary** to reorganization that the trustee in March, 1949, **halt** that trial by a federal injunction and start an entirely new suit in the federal court? If he had gone to trial in April, 1949, all claims would now be completely adjudicated and not, as in the dependent suit, still not at issue. With trial set in April, 1949, the trustee had **no** cause whatsoever to fear irreparable damage by the continued prosecution of the state court suit.

The Court of Appeals has charged to Magidson a delay which was due to the trustee alone. If the federal court did have jurisdiction (which we deny) it was wholly unnecessary to enjoin the state court which was ready to try the case in April, 1949. If the case had then been continued, the trustee could have had his federal action set and tried. Further "delay" in the state court could not "hinder" the federal action! And it is more than obvious that an injunction could not "aid" the federal court's jurisdiction, since that court could proceed without fetter or fear of anything the state court did.

Under the law and the express prohibition of Section 2283, the stay order should have been vacated irrespective of any other issue in the case. The trustee could not possibly have been "hindered" or "delayed" by permitting the case in the state court to go to trial.

III.

The order appealed from included a preliminary injunction. The trial court plainly erred in failing to make findings of fact, conclusions of law and a statement of reasons as required by Rules 52 (a) and 65 (d).

The Court of Appeals treated the order appealed from as one merely overruling a motion to set aside a temporary stay order. The Court overlooked the fact that the order of April 12, 1949, contained **two** parts: (1) an overruling of the motion to vacate the stay order, etc., **and** also (2) a ruling that "**the order staying the said proceeding pending in Division No. 2 of the Circuit Court of the City of St. Louis be and is hereby made absolute**" (R. 159, 160).

We are in perfect accord with the rule announced by the Court of Appeals that no findings are necessary upon the overruling of a motion. Rule 52 (a) so provides. However, the order appealed from also contained a preliminary injunction. The temporary restraining order, which did not contain the reasons for its issuance in clear violation of Rule 65 (d), discontinued on the day of the hearing. When the stay order was made **absolute**, it became a preliminary injunction, unconditional and without alternative, limitation or expiration date. We have **assumed**, of course, that the injunction was not permanent, since that relief could only be granted on final judgment after adjudication on the merits. The Court of Appeals seems to have misconstrued the stay order of March 17, 1949 as a "preliminary injunction" and the appealed order as a "permanent injunction," since the Court said:

> "The temporary and permanent injunctions issued by the trial court in the instant case were to aid and preserve the trial court's jurisdiction over the subject matter * * *."

However, whether the order appealed from was a preliminary injunction or a permanent injunction, it was no longer a temporary restraining order, and it was absolutely necessary that findings of fact and conclusions of law be made and that it contain the reasons for its issuance. Rules 52 (a) and 65 (d); United States v. Causby, 328 U. S. 256, 267, 268. "The reasons exist and they are not the less imperative when the injunction is interlocutory." Pub. Serv. Comm. v. Wis. Tel. Co., 289 U. S. 67, 70. Rule 65 (d) explicitly applies to all injunctions, preliminary or permanent.

We assure the court that the point we raise is no mere technicality. There were issues of fact as well as issues of law before the District Court at the hearing below. We mention only a few issues of fact:

> With the state action set on April 11, 1949, what was there on March 17, 1949, which could possibly have "delayed" or "hindered" decision of the matter or reorganization of the debtor so as to require injunctive interference by the federal court?
>
> How could the continued prosecution of the state court action interfere with or hinder a trial in the federal court even if the latter also had jurisdiction?
>
> What irreparable injury was imminent that necessitated a restraining order or even a preliminary injunction, and how could a state court dissipate a fund in a case wherein the trustee had not only intervened but later been joined as a defendant?

We also mention several issues of law before the District Court:

> Did the Austrian case rule that reorganization courts have exclusive jurisdiction of plenary suits by the trustee to the extent that comity is wiped out and state courts may be enjoined even though they are not hindering or delaying reorganization proceedings?

(Note: If Judge Moore so thought, then an entirely different question was presented for review and, in our opinion, would require reversal.)

Did Section 116 (4) of the Act, which was pleaded by the trustee and which gave reorganization courts power to enjoin actions against a debtor or its trustee, warrant an injunction against the continuation of a declaratory judgment suit?

(Note: If Judge Moore thought so, then he was in error and the order must be reversed. Cf. Gutensohn v. K. C. Southern Ry. Co., 8 Cir., 140 F. 2d 950, 953.)

In its brief in the Court of Appeals the trustee argued that "upon the filing of the petition the court was vested with **exclusive** jurisdiction." The Austrian case does **not** so hold, but none of us know whether Judge Moore might have thought so. If he entertained any such view of the law, then it is entirely conceivable that this case rode off on an erroneous point of law in the lower court and not on a belief from the facts pleaded or proved that injunctive relief was either necessary or desirable.

Respectfully submitted,

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